

ST 96-28

Tax Type: SALES TAX

Issue: Use Tax on Purchases of Building Materials & Supplies
Construction Contractor - Retail Sale or Perm. Affix.

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	
)	
v.)	Docket #
)	
TAXPAYER)	IBT #
)	
Taxpayer)	

RECOMMENDATION FOR DISPOSITION

APPEARANCES

REPRESENTATIVE, for TAXPAYER

SYNOPSIS

This cause came on to be heard following a Retailers' Occupation and Use Tax audit performed upon TAXPAYER (hereinafter "taxpayer") by the Illinois Department of Revenue (hereinafter the "Department") for the period of January 1, 1989 through June 30, 1990. After completion of the audit work, the auditor reviewed the audit findings with a representative of the taxpayer. Taxpayer did not agree with the Department's proposed assessment of certain items. The Department subsequently issued an assessment whose timely protest by taxpayer resulted in this contested case.

At issue is if certain building materials and tangible assets such as equipment are subject to Illinois Use Tax. It is the position of taxpayer the sales/use tax liability should be upon other parties.

After reviewing this matter, I recommend the issue be resolved in favor of the Department.

FINDINGS OF FACT

1. Taxpayer conducted business in Illinois during the audit period through operation of a hamburger restaurant that sold sandwiches and related fast food items to the public at retail. (Tr. pp. 24-25; Dept. Ex. No. 2)

2. PROMOTER 1 and PROMOTER 2 were promoters of the corporation formed to own the RESTAURANT restaurant in Maryville. (Tr. pp. 7-10, Taxpayer Ex. Nos. 1, 6 and 7)

3. TAXPAYER contracted through a pre-incorporation agreement with PROMOTER 1 and PROMOTER 2 to join them in moving the RESTAURANT restaurant project toward completion. (Tr. pp. 25-26; Dept. Ex. No. 2, pp. 89-94)

4. TAXPAYER agreed in Section 4 of the pre-incorporation contract with PROMOTER 1 and PROMOTER 2 to pay all bills and keep all financial records of the RESTAURANT restaurant. (Dept. Ex. No. 2, p. 90)

5. The pre-incorporation agreement is dated September 27, 1988, and is signed by TAXPAYER, PROMOTER 2 and PROMOTER 1 as individuals. (Dept. Ex. No. 2, p. 94)

6. Subsequent to September 27, 1988 and prior to commencement of selling food to the public at retail, TAXPAYER paid various bills connected with the construction and furnishing of the RESTAURANT restaurant. (Dept. Ex. No. 2, pp. 95, 100, 103)

7. The corporate promoters hired CONSTRUCTION Company to perform and subcontract various work such as site excavation, grading, concrete preparation and pouring, electrical, and plumbing. The actual building structure was not constructed by CONSTRUCTION COMPANY as it was a modular structure that the promoters had bought earlier from Machine & Engineering Company, a Mississippi corporation. Pursuant to the construction contract, TAXPAYER, as owner, was required to obtain and furnish the modular building structure and CONSTRUCTION COMPANY did affix it to the real estate at Highway 159 and Anthony Street, XXXXX. (Dept. Ex. No. 2, pp. 25, 67-74, 96, 98, 100-101)

8. The corporate promoters purchased tangible personal property in the form of various equipment items from Marketing Corporation prior to commencement of operations. (Dept. Ex. No. 2, pp. 25, 76-86)

9. After commencement of operations the taxpayer purchased tangible personal property in the form of moducom systems from XXXXX. (Dept. Ex. No. 2, pp. 25, 87)

10. The taxpayer registered under the Retailers' Occupation Tax Act with the Department to file monthly sales/use tax returns. The registration information shows a business start date of 1/13/89. (Dept. Ex. No. 2, pp. 46, 66)

11. The taxpayer introduced no documentary evidence to show that Illinois Retailers' Occupation or Use Tax was paid on the equipment purchased from XXXXX. (Dept. Ex. No. 2, pp. 25, 80-87; Tr. p. 3)

12. Pursuant to statutory authority, the auditor did cause to be issued a Correction and/or Determination of Tax Due (SC-10) and this served as the basis for Notice of Tax Liability (NTL) No. XXXXX issued February 8, 1991 for \$7,267.00, inclusive of tax, penalty and interest. (Dept. Ex. Nos. 1 and 3)

13. The introduction of the Department's corrected return and Notice of Tax Liability into evidence established its *prima facie* case. (Tr. p. 3; Dept. Ex. Nos. 1 & 3)

CONCLUSIONS OF LAW

Section 3 of the Use Tax Act (35 ILCS 105/3) imposes Use Tax upon the privilege of using in this State tangible personal property, including equipment and portable modular structures purchased from a retailer. When tangible personal property is purchased at retail, there is a presumption that tax is due unless one can document an exemption. I find the equipment and moducom systems purchased for use by taxpayer were tangible personal property subject to Use Tax.

Taxpayer argues that the entity XXXXX operated by PROMOTER 1 and PROMOTER 2 was a general contractor in the pre-incorporation development of the RESTAURANT and that XXXXX thus incurred the liability. I do not agree. This argument is in contrast with the documentary evidence herein as the pre-incorporation agreement was signed by PROMOTER 1, PROMOTER 2 and TAXPAYER as individuals. XXXXX is only mentioned in Section 8 regarding protection of its trademarks, and nowhere in the contract does it prohibit any of these three individuals from using agents or representatives to procure the property, goods, services and capital necessary to organize and then operate the RESTAURANT restaurant in XXXXX.

While three of the four transactions at issue were initiated prior to taxpayer's existence as an operating corporation, (Dept. Ex. No. 2, pp. 25, 68, 76, 86-87 and 95), the rule in Illinois is that a contract made by promoters for a corporation before it is formed may be adopted, ratified, or accepted by the corporation after it comes into existence, and the contract thereby becomes enforceable by or against the corporation, provided the agreement is one which the corporation itself could make and one which the agents of the company have expressed or implied authority to make. I.L.P. Corporations, Section 492; Steven v. Falese Land Co., 50 Ill.App. 3d 231, 240 (Second Dist. 1977) I find on this record the promoters had authority to execute these three transactions and that they were subsequently ratified by taxpayer corporation. The 1/17/89 date of the other transaction at issue involving the purchase of the modicum systems was after the corporation's commencement of operations.

Taxpayer also cites Illinois case law that has held that Use Tax is due by the person who purchases building materials and turns them into real estate, and is not due on the subsequent sale of the real estate to the construction contractor's customer. While that is a correct statement of Illinois law, the fact remains that what was assessed by the Department here was not a building constructed by construction contractor CONSTRUCTION COMPANY. Instead, it was modular building structure purchased from Stewart as a portable structure by

TAXPAYER and provided to CONSTRUCTION COMPANY pursuant to the construction contract, as the first full paragraph of said agreement states in part:

"The Contractor shall . . . develop the site and connect a modular RESTAURANT building (furnished by the Owner) in accordance with said plans in a substantial and workmanlike manner." (Dept. Ex. No. 2, p. 96)

I therefore find the modular structure was tangible personal property subject to Use Tax liability when it was purchased for transfer to CONSTRUCTION COMPANY Construction Company.

According to the documentary evidence in the record, all of the four transactions at issue involved the purchase of tangible personal property for use of the corporation taxpayer. I therefore find taxpayer's alternative argument (Tr. 38-39) that the transactions should be subject to service occupation tax to be without merit. The fact that a franchise fee or commission was paid is not dispositive here, as the auditor had determined this was the subject of a separate agreement and was not included in the selling price, or tax base, of the assessed tangible personal property.

In summary, I find that the taxpayer has not overcome the *prima facie* case of the Department, and the Notice of Tax Liability should stand as issued.

RECOMMENDATION

Based upon my findings and conclusions as stated above, I recommend the Department finalize NTL No. XXXXX in its entirety.

Karl W. Betz, Administrative Law Judge